

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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In the Matter of	)	
	)	
Petition for Declaratory Ruling Regarding	)	CG Docket No. 17-131
Broadband Speed Disclosure Requirements	)	

**COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY, THE  
ELECTRONIC FRONTIER FOUNDATION, AND CONSUMERS UNION**

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June 16, 2017

The Center for Democracy & Technology, the Electronic Frontier Foundation, and Consumers Union respectfully submit these comments opposing NCTA - the Internet and Television Association and US Telecom's petition for a declaratory ruling regarding broadband speed disclosure requirements.

The groups urge the Commission not to issue a declaratory ruling determining that "it is consistent with federal law for broadband providers to advertise the maximum ('up to') speeds available to subscribers on a particular tier, so long as the provider otherwise meets its obligations under the Commission's transparency requirements."<sup>1</sup> Such a ruling would contradict the Open Internet Transparency Rule<sup>2</sup> and the Commission's guidance on compliance with the Rule,<sup>3</sup> in place since 2010. It could allow broadband internet access service (BIAS) providers to make inaccurate and misleading statements to consumers about their network performance and capabilities, which the Transparency Rule is supposed to prevent.

The groups further urge the Commission to preserve the longstanding and effective federal-state system of cooperative consumer protection on false advertising and other deceptive business practices.<sup>4</sup> State consumer protection law is not preempted by the Commission's regulatory regime on internet service providers (ISPs). On the contrary, state prohibitions on unfair and deceptive business practices are harmonious with the prohibition of unjust and unreasonable practices in Section 201 of the Communications Act of 1934<sup>5</sup> and with the Transparency Rule's prohibition of inaccurate and misleading statements about network performance.<sup>6</sup>

## Introduction

In February 2017, the New York State Attorney General ("NY OAG") initiated a lawsuit in the Supreme Court of the State of New York alleging that Charter Communications ("Charter") and Spectrum Management Holding Company ("Spectrum") violated New York laws prohibiting

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<sup>1</sup> NCTA & USTelecom, *Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements* at 5, CG 17-131 (May 15, 2017), <https://ecfsapi.fcc.gov/file/10515751820200/Broadband%20Speed%20Petition%20for%20Declaratory%20Ruling.pdf> ("NCTA & USTelecom Petition").

<sup>2</sup> See *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, ¶¶ 154-85 (Feb. 26, 2015) ("2015 Open Internet Order").

<sup>3</sup> See generally FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule, Public Notice, 26 FCC Rcd 9411 (2011) ("2011 Guidance"); FCC Enforcement Advisory, Open Internet Transparency Rule, Broadband Providers Must Disclose Accurate Information to Protect Consumers, Public Notice, 29 FCC Rcd 8606 (2014) ("2014 Guidance"); Guidance on Open Internet Transparency Rule Requirements, Public Notice, 31 FCC Rcd 5330 (2016) ("2016 Guidance").

<sup>4</sup> See *infra* notes 51-53.

<sup>5</sup> 47 U.S.C. § 201(b).

<sup>6</sup> See 2015 Open Internet Order at ¶¶ 157-70.

fraud, deceptive business practices, and false advertising.<sup>7</sup> The NY OAG alleged that Spectrum (f/k/a Time Warner Cable (“TWC”)) “conducted a systematic scheme to defraud and mislead subscribers . . . by promising to deliver Internet service that [Spectrum-TWC] knew [it] could not and would not deliver.”<sup>8</sup> According to the complaint, Spectrum-TWC promised internet speeds as high as 300 Mbps in spite of knowing that their services would never reach those speeds because they failed to update their equipment and deliberately allowed their networks to become congested.<sup>9</sup> Spectrum-TWC also allegedly manipulated speed tests and made misrepresentations to the Commission about its equipment and performance capabilities.<sup>10</sup>

If the claims of the NY OAG are upheld, this request for declaratory ruling would amount to a request to the Commission to bless these false and misleading practices by declaring that a provider cannot be penalized for advertising “up to” speeds—no matter how unrealistic or unsubstantiated those speeds are—as long as it makes certain disclosures on its website. Petitioners’ arguments misrepresent the scope of the Transparency Rule and falsely characterize New York’s consumer protection laws as contradictory to the Commission’s rules, when in fact both regimes prevent deceptive business practices and false advertising, including inaccurate and misleading representation in advertising.

Thus, the Commission should not issue a declaratory ruling that would expressly allow specific statements in marketing materials, such as “up to” speeds, that could mislead consumers, or that would limit states’ authority to enforce against false advertising and fraudulent and deceptive business practices.

## **Discussion**

### **I. The Commission cannot rule that compliance with the Transparency Rule’s safe harbor shields a provider from responsibility for statements made in marketing materials.**

Petitioners’ requested ruling from the Commission would contravene the Transparency Rule, significantly narrow its scope, and undermine its purpose. Petitioners have asked the FCC to issue a declaratory ruling that, in part, holds that “it is consistent with federal law for broadband providers to advertise the maximum (‘up to’) speeds available to subscribers on a particular tier, so long as the provider otherwise meets its obligations under the Commission’s transparency requirements.”<sup>11</sup> If the Commission were to make such a declaration, it would undermine the

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<sup>7</sup> See Complaint, *New York v. Charter Commc’ns*, No. 450318/2017 (N.Y. Sup. Ct. Feb. 1, 2017) (“New York Complaint”).

<sup>8</sup> *Id.* at 6–13.

<sup>9</sup> *Id.* at 7–13.

<sup>10</sup> *Id.* at 8–10.

<sup>11</sup> NCTA & USTelecom Petition at 5.

purpose of the Transparency Rule, which is to hold providers accountable for their advertising claims. The Commission would effectively be endorsing the ability of providers to make potentially misleading claims in their advertising materials so long as they make a single disclosure on their websites.

**A. The Transparency Rule prohibits inaccurate and misleading statements about network performance even when the provider complies with standard disclosure formats.**

The petitioners request would contravene the purpose of the Transparency Rule. The rule requires providers to disclose sufficient relevant and accurate information in such a way that allows consumers to “make informed choices regarding the use of [BIAS] services.”<sup>12</sup> When the Commission clarified the Transparency Rule in the 2015 Open Internet Order, it sought to prevent providers from “eva[ding] the scope of [the] rule[] . . . through exploitation of narrowly-drawn exceptions.”<sup>13</sup> Petitioners’ request seeks to narrow the scope of the rule, and the ability of consumers to make informed choices, by allowing providers to communicate inaccurate, misleading, or contradictory statements about network performance in their advertising materials, as long as they make certain disclosures on their websites.

The declaration petitioners seek would prevent the Commission from enforcing against such violations by shielding providers that follow the safe harbor disclosure format from responsibility for any contradictory or inaccurate statements. The voluntary safe harbor satisfies the Transparency Rule as to the format in which providers give consumers notice of performance information,<sup>14</sup> but inaccurate or misleading information in the disclosures or in other materials can still give rise to Transparency Rule violations.

In its 2015 Open Internet Order, the Commission ruled that “[a] broadband provider meeting the safe harbor could still be found to be in violation of the rule, for example, if the content of that disclosure (e.g., prices) is misleading or inaccurate, or the provider makes misleading or

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<sup>12</sup> 2015 Open Internet Order at ¶ 157.

<sup>13</sup> *Id.* at ¶ 154.

<sup>14</sup> Consumer & governmental affairs, Wireline Competition, & Wireline Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels, 31 FCC Rcd. 3358 (2016); 2015 Open Internet order at ¶ 178 (“To be clear, use of the consumer disclosure format is a safe harbor with respect to the format of the required disclosure to consumers. A broadband provider meeting the safe harbor could still be found to be in violation of the rule, for example, if the content of that disclosure (e.g., prices) is misleading or inaccurate, or the provider makes misleading or inaccurate statements in another context, such as advertisements or other statements to consumers.”); *Id.* at ¶ 178 (“The Commission has not established that a single disclosure would always satisfy the rule; rather, it merely stated broadband providers ‘may be able’ to satisfy the Transparency Rule through a single disclosure.”); *Id.* at ¶ 171 n. 424 (“Broadband providers must actually disclose information required for consumers to make an “informed choice” regarding the purchase or use of broadband services . . .”).

inaccurate statements in another context, such as advertisements or other statements to consumers.”<sup>15</sup> In its 2014 advisory guidance, the Enforcement Bureau stated that the Transparency Rule prohibits a provider “from making assertions about its service that contain errors, are inconsistent with the provider’s disclosure statement, or are misleading and deceptive.”<sup>16</sup>

The disclosures petitioners ask the Commission to bless are precisely the type that the Commission sought to prevent with the Transparency Rule. In the 2015 Open Internet Order, the Commission “noted that consumers continue to express concern that the speed of their service falls short of advertised speeds . . . .”<sup>17</sup> This confusion appears to stem from misleading statements about network speed and other performance information in advertising materials.<sup>18</sup> As the NY OAG alleged in its complaint against Charter Communications and Spectrum Management Holding Company, providers have been found to advertise “up to” speeds knowing that customers will never actually reach those speeds.<sup>19</sup> In the case of Spectrum-TWC, the provider allegedly advertised “up to” speeds that it knew consumers would never experience because it failed to make necessary updates to its equipment, “knowingly allocated insufficient bandwidth” to subscribers, and allowed its network to become too congested to deliver the service performance it promised.<sup>20</sup>

The Commission intended to prevent misleading and contradictory statements about broadband speeds to ensure that consumers could make informed decisions about purchasing and using BIAS services. As the OAG’s findings demonstrate, “up to” speeds may bare no actual connection to the speeds customers can expect, even during off-peak times.<sup>21</sup> Thus, the Commission should deny petitioners’ request for a declaratory ruling that “it is consistent with federal law for broadband providers to advertise the maximum (‘up to’) speeds available to subscribers on a particular tier, so long as the provider otherwise meets its obligations under the Commission’s transparency requirements.”<sup>22</sup>

## **II. The Transparency Rule does not preempt state consumer protection law.**

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<sup>15</sup> 2015 Open Internet Order at ¶ 181; Decision and Order Granting Plaintiff’s Motion for Remand, *New York v. Charter Commc’ns*, 17 Civ. 1428 (2d Cir. 2017) (“Charter Remand Order”).

<sup>16</sup> 2015 Open Internet Order at ¶ 160 (citing 2014 Advisory Guidance at 8607).

<sup>17</sup> *Id.* at ¶ 163.

<sup>18</sup> *See generally* New York Complaint.

<sup>19</sup> *Id.* at 6–13.

<sup>20</sup> *Id.* at 6–13; Charter Remand Order at 3.

<sup>21</sup> New York Complaint at 6–13 (alleging that Spectrum-TWC advertised “up-to” speeds that it knew it could not deliver).

<sup>22</sup> NCTA and USTelecom Petition at 5.

As a part of its petition, the petitioners ask the FCC to rule that alleged compliance with the Transparency Rule preempts enforcement of state consumer protection laws. This claim does not rest upon established judicial precedent or an explicit preemption provision in federal statute. Instead, petitioners argue for preemption on the basis that BIAS is an “interstate service subject to exclusive federal regulation,”<sup>23</sup> notwithstanding the traditional role that states have played in “protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints.”<sup>24</sup> In summary, there are no grounds to support the assertion that the Transparency Rule preempts state consumer protection law.

**A. The Transparency Rule does not explicitly preempt or conflict with state consumer protection laws.**

Federal preemption can be established by the use of an express provision that declares that state law within the same field will be superseded by federal law.<sup>25</sup> However, there is no explicit provision in federal law that precludes the enforcement of state consumer protection laws in this context. In fact, petitioners do not make any claim to the existence of a provision in the Communications Act or within the Transparency Rule itself.

Petitioners also do not clearly state any basis for implied preemption in the petition. Implied preemption can be established if (1) it is “impossible for a private party to comply with both state and federal requirements”<sup>26</sup> or (2) when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>27</sup> But neither the intent nor the text of the Transparency Rule supports the argument that it is impossible to comply with both the Rule and a state consumer protection regime. The Transparency Rule requires ISPs to disclose “accurate information regarding the network management practices, performance, and commercial terms” to assist consumers in making informed decisions regarding internet use.<sup>28</sup> In order to meet the criteria for impossibility preemption, a state consumer protection law would have to include measures that prevent the disclosure of network performance and commercial terms to consumers. This kind of provision would directly contravene the purpose of a consumer protection framework, and petitioners do not offer an example of a state consumer protection law that fits this criteria.

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<sup>23</sup> *Id.* at 10.

<sup>24</sup> *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17970 n.374 (Dec. 23, 2010) (“2010 Open Internet Order”), *aff’d in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

<sup>25</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

<sup>26</sup> *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

<sup>27</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>28</sup> 47 CFR § 8.3.

Instead, state consumer protection laws and the Rule share a common purpose: to ensure that consumers have access to accurate information and can make informed decisions.<sup>29</sup> The Transparency Rule requires ISPs to make accurate disclosures to the public regarding network performance and commercial terms,<sup>30</sup> while state consumer protection laws provide a shield against “deceptive business practices and advertising.”<sup>31</sup> In this context, there is no conflict between the aims of the federal and state regimes--the laws complement each other.

Moreover, there are no grounds for the claim that state consumer protection laws serve as an obstacle to the implementation of federal law in this context. The Commission has outlined the relevant test, stating that it will evaluate whether state and local regulations frustrate the policy priorities outlined by Congress in Section 230 of the Communications Act and Section 706 of the Telecommunications Act of 1996.<sup>32</sup> The petition does not explain how state consumer protection laws may serve as an obstacle to the implementation of these policy priorities. But the Commission has previously and explicitly recognized the vital role that states serve in “protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints.”<sup>33</sup> Based on this understanding, the FCC has stated that it has “no intention of impairing states’ or local governments’ ability to carry out these duties unless (it) find(s) that specific measures conflict with federal law or policy.”<sup>34</sup> Given the lack of express conflict, the Commission must rule that the pertinent facts and law do not support a case for obstacle preemption.

From a process perspective, even assuming *arguendo* that such a conflict does exist, a blanket finding of preemption as a response to this petition would contradict established agency precedent. Beyond *prima facie* instances of conflict with FCC decisions, the Commission evaluates preemption through the lens of a fact-specific inquiry on a case-by-case basis.<sup>35</sup> In this case, the petition asks for a general clarification of the Transparency Rule, rather than asking for a specific evaluation of conflict between the Rule and a particular state consumer protection law. As a result, the petition falls short of the standard outlined by the Commission.

## **B. Internet service providers are not exempt from state consumer protection laws.**

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<sup>29</sup> 2010 Open Internet Order, 25 FCC Rcd at 17936, ¶ 53.

<sup>30</sup> 47 CFR § 8.3.

<sup>31</sup> Plaintiff’s Memorandum of Law in Support of Its Motion to Remand at 6, *New York v. Charter Communs.*, No. 17-cv-1428 (S.D.N.Y. March 13, 2017) (“Plaintiff’s Memorandum of Law”).

<sup>32</sup> 2010 Open Internet Order at 17970 n.374.

<sup>33</sup> *Id.* See also *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22404-05, ¶ 1 (Nov. 12, 2004) (“Vonage Order”).

<sup>34</sup> 2010 Open Internet Order at 17970 n.374.

<sup>35</sup> *Id.*

The preemption argument made by the petitioners appears to largely rest on a theory of implicit field preemption. More specifically, the petitioners argue that the Commission has consistently found that BIAS is “an interstate service subject to exclusive federal regulation.”<sup>36</sup> But while internet traffic has interstate characteristics, the FCC has recognized that it does not have the exclusive ability to regulate *all* aspects of service.<sup>37</sup> For instance, as discussed earlier, the Commission has recognized that states have a role in protecting consumers from fraud and enforcing fair business practices.<sup>38</sup> Additionally, the Communications Act contains a savings clause, which states that nothing in the Act “shall in any way abridge or alter the remedies now existing in common law or by statute, but the provisions of this Act are in addition to such remedies.”<sup>39</sup>

The Second Circuit has ruled directly on this point in the consumer protection context, holding in *Marcus v. AT&T* that the Communications Act does not “manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud” and that the savings clause “evidences Congress’ intent to allow such claims to proceed under state law.”<sup>40</sup> The Ninth Circuit built upon this in *Fisher v. NOS Communications*, finding that the “savings clause is fundamentally incompatible with complete preemption” in the consumer protection context.<sup>41</sup>

With this in mind, it can be concluded (1) that internet service providers are not wholly exempt from state law and (2) that Congress has explicitly provided for the ability for states to protect consumers from fraudulent ISP practices. The assertion that made by petitioners is not supported by either judicial precedent or statute. In ruling on the petition, the Commission should reaffirm precedent and the limits of the FCC’s reach.

### **III. Enforcement of state consumer protection laws to prevent deceptive and misleading statements by BIAS providers about the performance of their service offerings is consistent with the Commission’s regulatory regime.**

Petitioners’ concerns about complying with a “patchwork of inconsistent requirements” are unfounded.<sup>42</sup> The alleged inconsistency refers to petitioners’ responsibility to comply with both the Commission’s Transparency Rule and the state of New York’s consumer protection laws,

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<sup>36</sup> NCTA and USTelecom Petition at 15.

<sup>37</sup> Vonage Order at 22404, ¶ 1.

<sup>38</sup> 2010 Open Internet Order at 17970 n.374.

<sup>39</sup> 47 U.S.C. § 414.

<sup>40</sup> 138 F.3d 46, 54 (2nd Cir. 1998). See Plaintiff’s Memorandum of Law at 7-9 for an overview of relevant precedent.

<sup>41</sup> 495 F.3d 1052 (9th Cir. 2007).

<sup>42</sup> NCTA and USTelecom Petition at 1.



which prohibit deceptive business practices and false advertising.<sup>43</sup> The relevant provisions in both federal and state law prevent false and misleading statements or omissions that deceive consumers and undermine their ability to make informed choices. Nothing in the relevant New York consumer protection laws conflicts with the Commission’s Transparency Rule. To the contrary, the federal and state enforcement regimes complement each other, and both are necessary to ensure that consumers have access to the relevant, truthful information they need in order to choose among providers and services.

**A. Prohibitions of false advertising and deceptive business practices, like those that appear in New York’s consumer protection laws, are consistent with the Transparency Rule and Section 201 of the Communications Act of 1934.**

The Commission’s regulatory regime and New York’s consumer protection statutes work in concert to prohibit providers from engaging in false and deceptive marketing practices, including making false or misleading statements in marketing materials. Section 201 of the Communications Act of 1934 prohibits “unjust and unreasonable practices,”<sup>44</sup> and the commission has held that “unfair and deceptive marketing practices by interstate common carriers constitute unjust and unreasonable practices under Section 201(b).”<sup>45</sup> As explained in Part I, the Commission’s Transparency Rule prohibits providers from making “misleading or inaccurate” statements about the performance of their service offerings.

This language is mirrored in Sections 349 and 350 of New York’s General Business Law, Article 22-A.<sup>46</sup> Section 349 prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service . . . .”<sup>47</sup> Section 350 prohibits “false advertising,” which is defined as advertising that is “misleading in a material respect,” including the failure to reveal facts that are material in light of the representations made.<sup>48</sup> The Commission has stated that a provider may violate the Transparency Rule by advertising inaccurate or misleading performance information, even if the provider makes safe harbor-compliant disclosures on its website.<sup>49</sup> False or misleading statements about network performance—or omissions of information material to a customer’s decision to purchase or use a service—are thus actionable under the Commission’s rules and New York’s consumer protection law.

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<sup>43</sup> *Id.* at 3; New York General Business Law (“N.Y. GBL”) Art. 22-A §§ 349 and 350.

<sup>44</sup> 47 U.S.C. § 201(b).

<sup>45</sup> *In the Matter of Nobeltel, LLC*, FCC Rcd. 11760, 11762 (2012).

<sup>46</sup> N.Y. GBL Art. 22-A §§ 349 and 350.

<sup>47</sup> N.Y. GBL Art. 22-A § 349.

<sup>48</sup> N.Y. GBL Art. 22-A § 350.

<sup>49</sup> *See supra* notes 12–16.

Even if a state consumer protection law imposed liability outside of the scope of the Transparency Rule, this would not necessarily constitute a conflict meriting preemption. The Transparency Rule governs certain disclosures, but state unfair and deceptive business practices laws can cover a broader range of conduct. For example, the NY OAG alleged that Spectrum-TWC, among other things, “manipulated the results of the FCC’s speed tests” and “knowingly allocated insufficient bandwidth” to consumers.<sup>50</sup> States need the flexibility to investigate unfair and deceptive business practices beyond the disclosures required by the Transparency Rule in order to effectively protect consumers.

**B. State enforcement of consumer protection laws is a necessary complement to the Commission’s enforcement against BIAS providers’ deceptive business practices.**

Both the FCC and the Federal Trade Commission have long acknowledged the necessity of federal-state cooperation in consumer protection.<sup>51</sup> In the 1960s, President John F. Kennedy’s Consumer Advisory Council found that “if consumers were to be given adequate protection, it was necessary to provide remedies at state and local levels.”<sup>52</sup> In 2012, the FCC recognized “the important role that . . . federal and state regulatory partners play in protecting consumers.”<sup>53</sup> State attorneys general are often better able to investigate and respond to unfair and deceptive business practices that occur in their states.

The longstanding dual system of consumer protection between the FCC and the states is efficient and avoids overburdening the Commission with investigations. In the context of “cramming” (the fraudulent practice of placing unauthorized charges on customers’ telephone bills), the Commission acknowledged the need for state-level investigations of deceptive and fraudulent practices.<sup>54</sup> In its 2012 “cramming” order, the Commission recognized that states “have a wealth of information regarding cramming complaints and enforcement” and stated, “We expect that the carriers and the states will continue to play their primary roles in handling consumers’ cramming inquiries and complaints.”<sup>55</sup> States can provide critical enforcement resources to supplement the Commission’s consumer protection investigations, particularly if providers attempt to mislead

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<sup>50</sup> See Charter Remand Order at 3–4.

<sup>51</sup> See Federal Trade Commission, Remarks of Hon. Paul Rand Dixon, FTC Commissioner, before the Fla. Dep’t of Agriculture & Consumer Services (March 8, 1974), [https://www.ftc.gov/system/files/documents/public\\_statements/692471/19740308\\_dixon\\_federal-state\\_cooperation\\_to\\_combat\\_unfair\\_trade\\_practices\\_-\\_a\\_review.pdf](https://www.ftc.gov/system/files/documents/public_statements/692471/19740308_dixon_federal-state_cooperation_to_combat_unfair_trade_practices_-_a_review.pdf); *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”), Report and Order and Further Notice of Proposed Rulemaking*, 27 FCC Rcd 4436 at ¶ 111 (2012) (“2012 Cramming Order”).

<sup>52</sup> See Federal Trade Commission, Remarks of Hon. Paul Rand Dixon, FTC Commissioner, before the Fla. Dep’t of Agriculture & Consumer Services at 3 (March 8, 1974).

<sup>53</sup> 2012 Cramming Order at ¶ 111.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at ¶¶ 107–111.

the Commission. Allowing for preemption of state consumer protection statutes would bar consumers from seeking an avenue for recourse when an ISP has misled them through fraudulent or inaccurate marketing.

### **Conclusion**

The foregoing comments demonstrate that a declaratory ruling allowing BIAS providers to advertise “up to” speeds regardless of the accuracy of those speeds would contradict the Transparency Rule and significantly inhibit the Commission’s ability to prevent providers from making false and misleading claims to consumers about the performance of BIAS offerings. Moreover, the Commission and state government must work together to achieve a comprehensive consumer protection regime.